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# **DOE AND SMITH v. MUTUAL OF OMAHA INSURANCE COMPANY: THE POSSIBLE IMPACT OF INSURANCE CAPS ON HIV-INFECTED INDIVIDUALS**

*Mary Carol Joly\**

## **INTRODUCTION**

The Americans with Disabilities Act of 1990 (ADA) was enacted to address the overwhelming problem of rampant discrimination, both intentional and unintentional against all people with disabilities.<sup>1</sup> The purpose of the legislation was to provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."<sup>2</sup>

The question of how the ADA applies to the form and content of insurance policies is one that is mired in much confusion revolving around questions of legal interpretation and construction. It is often in the course of technical legal analysis that the simple purpose of laws is obscured. Although the ADA is not perfect with respect to clarity in all aspects, the prevailing theme supporting equal treatment for all

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<sup>1</sup>42 U.S.C. § 12101(b) (1994). This purpose was based in part on Congressional findings which stated:

[S]ome 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older; historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.

*Id.* § 12101(a)(1).

<sup>2</sup>*See id.*

regardless of their disabilities rings through.<sup>3</sup> The Supreme Court has yet to clarify whether, and just how, the ADA applies to private insurance policies. Certain circuit courts have, however, written on this issue.<sup>4</sup> In particular, on June 2, 1999 the Illinois Appellate court ruled that caps on Acquired Immune Deficiency Syndrome (AIDS) in privately funded insurance policies, which were not based on any actuarial data, did not violate the ADA.<sup>5</sup> The effect this ruling will have upon persons infected with human immunodeficiency virus (HIV) will be to bar them from equal participation in the benefits of privately funded insurance plans. This ruling goes against the purpose and intent of the ADA in two ways. First, it legitimizes a denial of access to private companies based only on disability status thus allowing stigma-based decision making.<sup>6</sup> Second, on a public policy note, it effectively assures that the financial burden of treatment for AIDS and AIDS-related conditions will land first upon the limited resources of the infected individual and then upon the state when those resources are exhausted.<sup>7</sup>

This article will first address the medical implications of infection with HIV. It will then briefly trace the background of the ADA, the legal definition of disability, and specifically whether HIV-infected status constitutes a disability under the ADA. Third, this article will look to the way in which medical insurance providers are regulated under Title III of the ADA, dealing with equal access to places of

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<sup>3</sup>See Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 697 (1999) (discussing the ambiguity of the term "impairment" within the statutory language of the ADA).

<sup>4</sup>See *Doe & Smith v. Mutual of Omaha*, 179 F.3d 557 (7th Cir. 1999).

<sup>5</sup>See *id.*

<sup>6</sup>Such stigma-based decision making has been held to be unconstitutional in AIDS testing contexts. See Michael T. Flannery, *Mandatory HIV Testing Of Professional Boxers: An Unconstitutional Effort To Regulate A Sport That Needs To Be Regulated*, 31 U.C. DAVIS L. REV. 409, 466-67 (1998).

<sup>7</sup>This result seems directly opposed to specific language of the ADA which states:

[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 U.S.C. § 12101 (a)(8) (1994).

public accommodations. Next, the article will take an in-depth look into a recent Seventh Circuit decision that held Title III inapplicable to an insurance company, which placed caps on AIDS and AIDS-related injuries. Finally, it will question the wisdom of the Seventh Circuit holding in light of other legislation and public policy considerations.

## BACKGROUND

### HIV, AIDS, and AIDS-Related Conditions

AIDS, which was first reported in 1981, has become one of the most serious epidemics in recent history.<sup>8</sup> A virus known as the human immunodeficiency virus or HIV causes AIDS.<sup>9</sup> This virus hampers the body's ability to combat infections by attacking the immune system.<sup>10</sup> HIV can be transmitted through sexual contact, contaminated blood, infectious needles, pregnancy, and mother's breast milk.<sup>11</sup>

It is now widely recognized in the medical field that HIV causes AIDS.<sup>12</sup> HIV attacks the body's immune system by destroying important immune cells called CD4-T cells or T-helper cells.<sup>13</sup> The T-helper cell count of a healthy person is generally 800-1,200 per cubic millimeter of blood.<sup>14</sup> A dangerously low T-helper cell count is one that is below 200 per cubic millimeter and results in a greater risk of contracting opportunistic infections<sup>15</sup> and cancer.<sup>16</sup>

Approximately three-tenths of one percent of the national population--650,000 to 900,000 persons--in the United States are

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<sup>8</sup>NIAID Fact Sheet, *HIV Infection and AIDS*, at

<http://www.niaid.nih.gov/factsheets/hivinf.htm> (last visited: September 9, 2000) [hereinafter *HIV Infection and AIDS*].

<sup>9</sup>See *Cause of AIDS*, at <http://www.cdc.gov/hiv/hivinfo/overview> (last visited September 9, 2000) [hereinafter *Cause of AIDS-HIV*].

<sup>10</sup>See *id.*

<sup>11</sup>See *HIV Infection and AIDS*, *supra* note 8; see also *HIV Transmission*, at <http://www.cdc.gov/hiv/hivinfo/vfax/260010.htm> (last visited July 9, 2000), see also Nancy R. Mansfield et al., *Insurance Caps on AIDS-Related Healthcare Costs Will the ADA fill the Gap Created by ERISA?*, 14 GA. ST. U. L. REV. 601, 604 (1998).

<sup>12</sup>*Cause of Aids-HIV*, *supra* note 9.

<sup>13</sup>See NIAID Fact Sheet, *How HIV Causes AIDS*, at <http://www.niaid.nih.gov/factsheets/howhiv.htm> (last visited September 9, 2000).

<sup>14</sup>See *id.*

<sup>15</sup>See *id.*

<sup>16</sup>See *id.*

currently infected with HIV.<sup>17</sup> Although the greatest percentage of infected persons includes adult men, there is a growing trend in reported cases among adult women and children, especially those in minority groups.<sup>18</sup> There is, however, an increasing difficulty in gathering data that accurately reflects the current trend of the virus.<sup>19</sup> This is due primarily to the fact that recent advances in treatment have slowed the time period between infection, onset of AIDS, and death resulting from AIDS.<sup>20</sup> While, on one hand, this is encouraging because death caused by HIV is decreasing, it causes problems in assessing data that is extremely important in determining the location and rate of incidence of new infections.<sup>21</sup> This information is necessary for providing prevention and treatment services.<sup>22</sup>

HIV has various stages of symptomatic occurrences.<sup>23</sup> In the earliest stage, an infected person will experience flu-like symptoms within one to two months of exposure to the virus.<sup>24</sup> These symptoms continue for a relatively short time, usually a week to a month and constitute the time at which the infected person is most contagious.<sup>25</sup> In the second stage HIV goes into an asymptomatic period that may last anywhere from a few months to ten years.<sup>26</sup> It is at this point that the immune system is deteriorating and the body's T-helper cells are being increasingly destroyed.<sup>27</sup> HIV-infected persons experience various symptoms including: "swollen glands, . . . lack of energy, weight loss, frequent fevers and sweats, persistent or frequent yeast infections (oral

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<sup>17</sup>See CDC-NCHSTP-Divisions of HIV/AIDS Prevent...RMATION – STATISTICAL PROJECTIONS/TRENI, at <http://www.cdc.gov/hiv/hivinfo/vfax/260210.htm> (last visited July 9, 2000) [hereinafter Statistical Projections].

<sup>18</sup>See *id.* at 2. The Centers for Disease Control states that approximately one in every 300 persons is infected with the virus. See *id.* at 2. This statistic is clarified further along gender lines to show that the disease affects approximately one in every 160 males is affected and one in every 1,000 females. See *id.* at 2. In 1998, 688,200 cases of AIDS were reported. See *id.* at 2. The breakdown went as follows: "679,739 adolescents and adults, 570,425 men, 109,311 women, and 8,461 children less than 13 years of age. See *id.* at 2. A total of 410,800 of the 688,200 persons reported with AIDS have died." *Id.* at 1.

<sup>19</sup>See *id.*

<sup>20</sup>See *id.*

<sup>21</sup>See *id.*

<sup>22</sup>See Statistical Projections, *supra* note 17, at 1.

<sup>23</sup>See *id.*

<sup>24</sup>See *id.*

<sup>25</sup>See *id.*

<sup>26</sup>See *id.*

<sup>27</sup>See Statistical Projections, *supra* note 17, at 1.

or vaginal), persistent skin rashes or flaky skin, pelvic inflammatory disease that does not respond to treatment, or short-term memory loss."<sup>28</sup>

In the third stage of HIV, an individual is diagnosed with AIDS.<sup>29</sup> Officially this stage begins when an infected person's T-cell count falls below 200.<sup>30</sup> It is the period at which the immune system becomes unable to combat opportunistic infections, or infections which would normally be easily overcome by healthy immune systems exhibiting such symptoms as: coughing, shortness of breath, seizures, mental symptoms such as confusion and forgetfulness, severe and persistent diarrhea, fever, vision loss, severe headaches, weight loss, extreme fatigue, nausea, vomiting, lack of coordination, coma, abdominal cramps, or difficult or painful swallowing.<sup>31</sup> In the final stage of AIDS persons with the virus contract various serious and often fatal diseases such as Kaposi's sarcoma and lymphoma, which are more difficult to treat in persons with the disease due to the decreased effectiveness of the immune system.<sup>32</sup>

While AIDS is presently considered a fatal disease, there are still avenues for treatment. HIV is treated primarily through pharmaceutical avenues.<sup>33</sup> There are three main types of drugs that are implemented in

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<sup>28</sup>See *id.*

<sup>29</sup>*HIV Infection and AIDS*, *supra* note 8.

<sup>30</sup>See *id.*

<sup>31</sup>See *id.*

<sup>32</sup>See *id.*

<sup>33</sup>See *HIV Infection and AIDS*, *supra* note 8, at 2; see also *HIV Infection and AIDS*, at <http://www.niaid.nih.gov/factsheets/hivinf.htm> (last visited September 9, 2000) stating:

The Food and Drug Administration has approved a number of drugs for the treatment of HIV infection. The first group of drugs used to treat HIV infection, called nucleoside analog reverse transcriptase inhibitors (NRTIs), interrupt an early stage of virus replication. Included in this class of drugs are zidovudine (also known as AZT), zalcitabine (ddC), didanosine (ddI), stavudine (D4T), lamivudine (3TC) and abacavir succinate. These drugs may slow the spread of HIV in the body and delay the onset of opportunistic infections. Importantly, they do not prevent transmission of HIV to other individuals. Non-nucleoside reverse transcriptase inhibitors (NNRTIs) such as delavirdine, nevirapine and efavirenz are also available for use in combination with other antiretroviral drugs. A third class of anti-HIV drugs, called protease inhibitors, interrupts virus replication at a later step in its life cycle. They include ritonavir, saquinavir, indinavir and nelfinavir. Because HIV can become resistant to each class of drugs, combination treatment using both is necessary to effectively suppress the virus.

treatment.<sup>34</sup> These groups are comprised of: nucleoside analog reverse transcriptase inhibitors (NRTIs) which have been found to be effective in the early stage of the virus; non-nucleoside reverse transcriptase inhibitors (NNRTIs), which are used to supplement other antiretrovirals; and protease inhibitors, which attack the virus in its later stages.<sup>35</sup>

### The Battle for Civil Rights for People with Disabilities

The birth of civil rights came with the Reconstructionist Congress' enactment of three Constitutional Amendments prohibiting slavery and involuntary servitude throughout the United States and then the Supreme Court's interpretation thereof.<sup>36</sup> In 1871, as the Ku Klux Klan (Klan) terrorized the South, Congress responded by enacting the Ku Klux Klan Act to curb the Klan's activities in the South.<sup>37</sup> The Act created a federal civil cause of action against individuals who conspire to deprive any person, or class of persons, "equal protection of the laws" or "equal privileges and immunities under the laws."<sup>38</sup>

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Currently available antiretroviral drugs do not cure people of HIV infection or AIDS, however, and they all have side effects that can be severe. AZT may cause a depletion of red or white blood cells, especially when taken in the later stages of the disease. If the loss of blood cells is severe, treatment with AZT must be stopped. DdI can cause an inflammation of the pancreas and painful nerve damage.

*Id.*

<sup>34</sup>See *HIV Infection and AIDS*, *supra* note 8.

<sup>35</sup>See *id.*

<sup>36</sup>See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that "separate but equal" schools were inherently unequal and deprived black students of equal protection of the laws under the Fourteenth Amendment); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (construing the due process clause to allow for mandating racial segregation in railroad passenger compartments); *The Civil Rights Cases*, 109 U.S. 3 (1883) (comprising a compilation of cases involving alleged private racial discrimination by six different persons from throughout the United States).

<sup>37</sup>See Ku Klux Klan Act of 1871, ch. 22, § 2, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1985(3) (1994)).

<sup>38</sup>*Id.* The Ku Klux Klan Act of 1871 reads, in pertinent part:

If two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the

The legal significance of defining the disabled as possessing "class" status was illustrated by the United States Court of Appeals for the Third Circuit in *Lake v. Arnold*, where a woman with a mental disability was sexually sterilized without her consent.<sup>39</sup> After analyzing Elizabeth Arnold Lake's claim of deprivation of civil rights under 42 U.S.C. § 1985(3) the court concluded that people with mental disabilities are a class for purposes of §1985 analysis.<sup>40</sup>

While the Reconstructionist amendments were construed very narrowly after their enactment and were applied only to race discrimination, they are now looked to as an all-embodying American statement on the sanctity of the right of the individual human person to all of the basic rights inherent in a free society.<sup>41</sup> The notion of civil rights is one which has been taken up as a weapon against discrimination based on not only race but also national origin,<sup>42</sup> gender,<sup>43</sup> religion,<sup>44</sup> sexual identity,<sup>45</sup> and, more recently, disability

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United States, the party so injured or deprived may have an action for the recovery of damages . . . against any one or more of the conspirators.

*Id.*

<sup>39</sup>*Lake v. Arnold*, 112 F.3d 682, 687 (3d Cir. 1997).

<sup>40</sup>*See* 42 U.S.C. § 1985(3), *quoted in Lake v. Arnold*, 112 F.3d 682, 687 (3d Cir. 1997).

The statute provides, in pertinent part:

If two or more persons in any State or Territory conspire...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws...the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. 42 U.S.C. § 1985(3).

<sup>41</sup>*See, e.g.,* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 146-48 (1997); DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS 199-232 (1993)

<sup>42</sup>*See, e.g.,* *Sugarman v. Dougall*, 413 U.S. 634 (1973) (holding that the Equal Protection Clause is not unavailable to individuals based on national origin).

<sup>43</sup>*See, e.g.,* *United States v. Virginia*, 518 U.S. 515 (1996) (holding exclusion of women at military academy violative of the Equal Protection Clause); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (holding gender-based distinction between widows and widowers and gender-based discrimination against covered female wage earners with respect to Social Security benefits violative of due process and equal protection clause); *Craig v. Boran*, 429 U.S. 190 (1976) (holding statistics regarding drinking habits of young adults to be an insufficient basis for gender-based classifications); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding state disability insurance program provision excluding benefits for disability resulting from normal pregnancy did not violate Equal Protection Clause); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding classifications based upon sex are inherently suspect and must be subjected to strict judicial scrutiny); *Reed v. Reed*, 404 U.S. 71 (1971) (holding statute which provided that as between persons equally qualified to administer estates males must be preferred to females



status.<sup>46</sup> One such legislative weapon that has been born out of this philosophy is the ADA, which has been labeled "a civil rights bill."<sup>47</sup>

### **The Americans with Disabilities Act**

In 1991, Congress passed the ADA in order to definitively end discrimination against people with disabilities and reestablish their civil rights.<sup>48</sup> Prior to the enactment of this legislation, protection against discrimination based on disabilities was available only in limited aspects.<sup>49</sup> For instance, in 1973, Congress passed the Rehabilitation Act, which prohibited discrimination against persons with disabilities but applied only to claims against the federal government.<sup>50</sup> While the Rehabilitation Act recognized the federal government's duty to foster the rights of all citizens including those with disabilities, it left unspoken, and thus unenforceable, the duty with respect to the rest of society to adhere to it's construct.<sup>51</sup> In 1990, the ADA provided the much-needed supplemental protection.<sup>52</sup> The ADA filled some of the previous legislation's gaping holes and was touted as "the most comprehensive civil rights measure in the past two and a half decades."<sup>53</sup> The ADA expands the duty to uphold the rights of persons with disabilities to apply to non-governmental entities.<sup>54</sup> The Act is split into five separate titles, which prohibit discrimination on several levels: Title I prohibits discrimination based on disability within the

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violative of the Equal Protection Clause).

<sup>44</sup>See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding a significant state interest can prevail over a free exercise of religion interest); *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding only a significant state interest can effectively override the free exercise of religion interest).

<sup>45</sup>See generally *Romer v. Evans*, 517 U.S. 620 (1996) (holding that legislation which serves only to make homosexual status unequal is unconstitutional).

<sup>46</sup>See, e.g., *City of Cleburne v. Cleburne Living Center*, 793 U.S. 432 (1985).

<sup>47</sup>H.R. REP. NO. 101-485(I), at 25 (1990), reprinted in 1990 U.S.C.C.A.N. 268.

<sup>48</sup>See 42 U.S.C. § 12100 (1994).

<sup>49</sup>See 29 U.S.C. § 794(a) (1994).

<sup>50</sup>See *id.*

<sup>51</sup>See Pub. L. No. 93-112 § 504, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (1994)).

<sup>52</sup>See 42 U.S.C. §§ 12101-12110 (1994).

<sup>53</sup>Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 414 (1991).

<sup>54</sup>See, e.g., 42 U.S.C. §§ 12182-12189 (1994) (prohibiting discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation).

employment context;<sup>55</sup> Title II prohibits discrimination by entities, receive federal assistance;<sup>56</sup> Title III prohibits discrimination by private entities, that hold themselves open to the public;<sup>57</sup> Title IV prohibits discrimination in telecommunications;<sup>58</sup> and Title V contains miscellaneous anti-discrimination provisions.<sup>59</sup>

### *Disability Defined*

In order to utilize the ADA to uphold basic civil rights, a person first must meet the definitional requirements of disability.<sup>60</sup> The ADA defines disability in a three-prong format. A person will be considered to have a disability if that person (1) has a "physical or mental impairment that substantially limits one or more . . . major life activities," (2) has a "record of" such an impairment; or (3) is "regarded as having such an impairment."<sup>61</sup> Additionally, a determination as to whether a disability exists will be made on a case-by-case basis.<sup>62</sup>

The Supreme Court has recently substantially qualified the disability definition by interpreting the ADA to apply to only those individuals with substantial limitations after any mitigating medical measures are in place.<sup>63</sup> In other words, if a condition is somehow corrected, or controlled, by medication or some other measure, the ADA definition of disability does not apply.<sup>64</sup>

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<sup>55</sup>See 42 U.S.C. §§ 12111-12117 (1994).

<sup>56</sup>See 42 U.S.C. §§ 12131-12134, 12141-12150, 12161-12165 (1994).

<sup>57</sup>See 42 U.S.C. §§ 12181-12189 (1994).

<sup>58</sup>See 47 U.S.C. § 225 (1996).

<sup>59</sup>See 42 U.S.C. § 12201 (1994).

<sup>60</sup>See 42 U.S.C. § 12102(2) (1994).

<sup>61</sup>See *id.*

<sup>62</sup>See *id.*

<sup>63</sup>See generally *Albertsons, Inc., v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. UPS*, 527 U.S. 516 (1999); *Sutton v. United Airlines*, 527 U.S. 471 (1999) (all holding determination of disability is properly made after taking into account mitigating measures). In these cases, the Supreme Court looked at three examples of mitigating measures including corrective lenses, and blood pressure medication. The Court advised that the inquiry into whether a specific mitigating measure constituted a "corrected condition" should be made on a case by case basis, and pointed out that prong three of the definition of disability or the "regarded as" prong would still be a valid context within which to bring an ADA claim. *Sutton*, 527 U.S. at 489. An analysis of whether infection with the HIV virus constitutes a disability under this new interpretation given by the Supreme Court is beyond the scope of this discussion. It is relevant to note, however, that *Mutual of Omaha* conceded on the issue of whether the plaintiffs were persons with disabilities by accepting that they were.

<sup>64</sup>See *Sutton*, 527 U.S. at 1241.

### *HIV-Positive Status as a Disability*

Notwithstanding the recent Supreme Court interpretation of the definition of disability, persons infected with AIDS will likely remain persons with disabilities under the law.<sup>65</sup> This is because the Supreme Court recently held, in *Bragdon v. Abbott*, that asymptomatic HIV-status constitutes a disability, substantially limiting the major life function of procreation.<sup>66</sup> The Court's ruling resolved the split in the circuits over this issue.<sup>67</sup>

Prior to *Bragdon*, the Fourth Circuit held that a bank employee with asymptomatic HIV was not a person with a disability under the three-prong ADA definition and thus lacked standing to bring an employment discrimination claim.<sup>68</sup> The court based this ruling on the fact that there were no immediate debilitating effects suffered by the individual.<sup>69</sup> Secondly, the court held that a concern about the risk of possible infection to a partner did not create a substantial limitation on the life function of procreation or sexual intercourse.<sup>70</sup> The court reasoned the infection did not inherently restrict procreation or sexual intimacy.<sup>71</sup>

Alternatively, the First Circuit came to the opposite result in the appellate decision of *Abbott v. Bragdon*.<sup>72</sup> In this case, the plaintiff was denied dental treatment due to HIV-positive status.<sup>73</sup> The court, in a two-part ruling, found HIV-status to be a physical impairment and procreation to be a major life activity.<sup>74</sup> Eight-percent risk of

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<sup>65</sup>See Sarah Lynn Oquist, *Reproduction Constitutes a "Major Life Activity" under the ADA: Implications of the Supreme Court's Decision in Bragdon v. Abbott*, 32 CREIGHTON L. REV. 1357, 1431 (April, 1999).

<sup>66</sup>See *Bragdon v. Abbott*, 524 U.S. 624 (1998).

<sup>67</sup>See generally *Doe v. Kohn Nast & Graf, P.C.*, 862 F.Supp. 1310 (E.D. Pa. 1994); *Cain v. Hyatt*, 734 F. Supp. 671 (E.D. Pa. 1990); *Howe v. Hull*, 873 F. Supp. 72 (N.D. Ohio 1994); *T.E.P. v. Leavitt*, 840 F. Supp. 110 (D.Utah, C.D. 1993) (all favoring inclusion of HIV-infection as disabilities). Cf. *Zatarian v. WDSU-Television, Inc.*, 881 F.Supp. 240 (E.D. La. 1995); *Cortes v. McDonald's Corp.*, 955 F. Supp 541 (E.D. N.C. 1996); *Abbott v. Bragdon* 107 F.3d 934 (1st Cir. 1997) (all opposing inclusion of reproductive impairments and HIV-infection as disabilities).

<sup>68</sup>See *Runnebaum v. NationsBank of Maryland*, 123 F.3d 156 (4th Cir. 1997).

<sup>69</sup>See *id.* at 160.

<sup>70</sup>See *id.* at 170.

<sup>71</sup>See *id.*

<sup>72</sup>*Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997).

<sup>73</sup>See *id.* at 937.

<sup>74</sup>See *id.* at 939-40.

transmission was found to be not insignificant in the assessment of whether a concern of transmission created a substantial limitation.<sup>75</sup> Additionally, the court noted that a showing of a desire to procreate was not necessary.<sup>76</sup>

The Supreme Court resolved this split in the circuits by granting certiorari to *Abbott v. Bragdon* and affirming the First Circuit's holding.<sup>77</sup> The Court found HIV-positive status to constitute a physical impairment because there are immediate systemic changes after infection with the virus.<sup>78</sup> Secondly, the Court reaffirmed the notion that reproduction constitutes a central function within the life process.<sup>79</sup> Thus the Court held that asymptomatic HIV-infection qualified as "an impairment which substantially limits the major life activity of reproduction."<sup>80</sup>

### *Title III of the ADA*

Title III of the ADA was ratified in order to ensure that persons with disabilities have access to private businesses, which hold themselves out to provide goods and services to the public.<sup>81</sup> The Act states: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."<sup>82</sup> In order to establish discrimination under Title III of the ADA a plaintiff must prove three elements: (1) that he or she has a disability; (2) that the defendant is a "private entity" engaged in the operation of a "public accommodation;" and (3) that the plaintiff

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<sup>75</sup>See *id.* at 942.

<sup>76</sup>See *id.*

<sup>77</sup>See *Bragdon*, 524 U.S. at 655.

<sup>78</sup>See *id.* at 657.

<sup>79</sup>See *id.* at 660.

<sup>80</sup>See *id.* at 655. Similarly, HIV has been ruled to be a "handicap" under Civil Rights Laws. See e.g., *Doe v. Kohn, Nast & Fraf, P.C.*, 862 F. Supp. 1310 (E.D.Pa. 1994) (holding attorney with HIV to have a physical or mental impairment that substantially limited one of his major life activities and thus was a disability); *Glanz v. Vernick*, 756 F. Supp. 632 (D.Mass. 1991) (holding patient with HIV to be handicapped under the Rehabilitation Act); *Benjamin R. v. Orkin Exterminating Co.*, 390 S.E.2d 814 (W.Va. 1990) (holding person who tests positive for HIV has "handicap" within the meaning of West Virginia Human Rights Act).

<sup>81</sup>See 42 U.S.C. § 12182(a) (1994).

<sup>82</sup>See *id.*

was denied access on the basis of his or her disability and that the defendant failed to make "reasonable accommodations" that would not "fundamentally alter" the character of the place of public accommodation.<sup>83</sup>

### *Place of Public Accommodation*

A "place of public accommodation" is defined by the ADA as "a facility, operated by a private entity whose operations affect commerce and fall within at least one" category laid out in § 12181(7).<sup>84</sup> These categories include:

- A. An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- B. A restaurant, bar, or other establishment serving food or drink;
- C. A motion picture house, theatre, concert hall, stadium, or other place of exhibition or entertainment;
- D. An auditorium, convention center, lecture hall, or other place of public gathering;
- E. A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- F. A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service,

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<sup>83</sup>See 42 U.S.C. § 12182(a)-(b); see also *Kaltenberger v. Ohio College of Podiatric Med.*, 162 F.3d 432, 435 (6th Cir. 1998); *Andrews v. State of Ohio*, 104 F.3d 803, 807 (6th Cir. 1997); *Ohio Civil Rights Comm'n v. Case W. Reserve Univ.*, 666 N.E.2d 1376, 1383 (1996).

<sup>84</sup>42 U.S.C. § 12181(7)(1994).

- funeral parlor, gas station, office of accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- G. A terminal, depot, or other station used for specified public transportation;
  - H. A museum, library, gallery, or other place of public display or collection;
  - I. A park, zoo, amusement park, or other place of recreation;
  - J. A nursery, elementary, secondary, undergraduate, or post graduate private school, or other place of education;
  - K. A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
  - L. A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.<sup>85</sup>

The analysis of whether there exists discrimination under Title III should properly focus on the "place" of accommodation rather than a certain "event."<sup>86</sup> This section of the ADA will cover an entity if it falls within the category of owning, leasing, or operating property.<sup>87</sup> The ADA fails to provide a precise definition describing what "in operation" entails.<sup>88</sup> However, the preamble to the Code of Federal Regulations, which implement the ADA, indicate that temporary

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<sup>85</sup>42 U.S.C.A. § 12181(7) (1994). See Americans With Disabilities Act of 1990, 28 C.F.R. § 36.104 (1999).

<sup>86</sup>*Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000); *Olinger v. United States Golf Ass'n.*, 55 F. Supp. 2d 926, 930 (N.D. Ind. 1999).

<sup>87</sup>See *Olinger* 55 F. Supp. 2d at 931., citing 28 CFR pt. 36, app B at 591 (1993).

<sup>88</sup>See *id.*

utilization of property will constitute "operation" if the alleged discrimination occurred during the time of utilization.<sup>89</sup> Courts have further clarified this by holding that an entity will be determined to be "in operation" of a place of public accommodation if it exhibits sufficient control over a location.<sup>90</sup> Sufficient control is established by showing a "close connection" between the facility and the entity in question.<sup>91</sup> In *Welsh v. Boy Scouts of America*,<sup>92</sup> the court held that for an entity to constitute a "place of public accommodation," a membership organization must have "a close connection to a particular facility."<sup>93</sup> This connection exists if (1) the organization is affiliated with a particular facility, and (2) membership in (or certification by) that organization acts as a necessary predicate to use of the facility.<sup>94</sup>

### *Access Denied on the Basis of Disability*

Discrimination by private entities offering public services occurs (1) when an entity imposes eligibility criteria which tends to "screen out" individuals with disabilities, (2) when persons are denied the opportunity to participate in a public accommodation's goods and services or, by virtue of a failure to make reasonable modifications, unless those modifications would fundamentally alter the nature of the goods or services, or (3) when an entity fails to take steps to modify necessary to ensure persons with disabilities are not denied services or treated differently than those without disabilities.<sup>95</sup> A plaintiff alleging discrimination under Title III is not required to prove discriminatorily motivated animus in order to state a claim.<sup>96</sup> Rather, a plaintiff needs to show that he or she has a disability and that, due to this disability,

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<sup>89</sup>See 28 C.F.R. 36, app. B, at 593.

<sup>90</sup>See *id.* at 5. See generally *Bowers v. National Collegiate Athletic Ass'n*, 9 F. Supp. 2d 460 (D.N.J.1998) (holding athletic association to be a "private entity" and thus potentially subject to Title III of ADA); *Tatum v. National Collegiate Athletic Ass'n*, 992 F. Supp. 1114 (E.D. Mo. 1998) (holding the NCAA operates a place of public accommodation).

<sup>91</sup>See *Ganden v. National Collegiate Athletic Ass'n*, 1996 WL 680000, at \*10 (N.D.Ill. 1996).

<sup>92</sup>993 F.2d 1267 (7th Cir. 1993).

<sup>93</sup>See *id.* at 1270.

<sup>94</sup>See *id.* at 1272; *Elitt v. U.S.A. Hockey*, 922 F. Supp. 217, 223 (E.D. Mo. 1996).

<sup>95</sup>See 42 U.S.C. § 12182(b) (1994).

<sup>96</sup>See *id.*; see *Arnold v. United Artists Theatre Cir., Inc.*, 866 F. Supp. 433 (N.D.Cal. 1994).

was denied access to a service.<sup>97</sup> These modifications are not absolute, however. The modifications are not required if they would “fundamentally alter” the nature of the goods or services;<sup>98</sup> if by making them the entity would be subjected to an “undue burden;”<sup>99</sup> or if they would impose a “direct threat” to the health and safety of others.<sup>100</sup>

### *Reasonable Modification*

The reasonable modification analysis under Title III is parallel to the reasonable modification analysis of the ADA’s other titles.<sup>101</sup> A determination of whether a modification is reasonable involves a case-by-case, fact specific inquiry.<sup>102</sup> This inquiry requires weighing the efficacy of the modification against the entity’s cost of implementation.<sup>103</sup> A modification will be deemed unreasonable if, when looking at the overall operations, it alters the essential nature of the facility and a financial burden will result.<sup>104</sup> Finally, due to the fact-specific nature of the necessary inquiry, the question of whether a modification is reasonable will generally be one which has to be answered at trial and not at the summary judgment stage.<sup>105</sup>

### *Insurance Companies as Places of Public Accommodation*

As seen above, the ADA specifically included insurance offices within the listing of examples of facilities covered by the public accommodations provision of the ADA.<sup>106</sup> Thus, it is undisputed that Congress contemplated insurance providers in the drafting of Title III.<sup>107</sup> A more difficult issue involves the scope of this coverage. While the language of Title III specifically refers to “insurance

<sup>97</sup>See 42 U.S.C. § 12183(b) (1994).

<sup>98</sup>See 42 U.S.C. § 12182(b)(2)(A)(ii) (1994).

<sup>99</sup>See 28 C.F.R. § 36.104 (1994).

<sup>100</sup>See 42 U.S.C. § 12182(b)(3) (1994).

<sup>101</sup>See *Powers v. MJB Acquisition Corp.*, 993 F. Supp. 861, 868 (D. Wyo. 1998)

<sup>102</sup>See *id.*

<sup>103</sup>See *Staron v. McDonald’s Corp.*, 51 F.3d 353, 355-56 (2d Cir. 1995)

<sup>104</sup>See *Powers*, 993 F.Supp. at 868; *Easley v. Snider*, 36 F.3d 297, 305 (3d Cir. 1994)

<sup>105</sup>See *Powers*, 993 F. Supp. at 868; see also *Crowder v. Kitagawa*, 31 F.3d 1430, 1436 (9th Cir. 1996).

<sup>106</sup>See *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir.2000); *Olinger v. United States Golf Ass’n*, 55 F. Supp. 2d 926, 930 (N.D. Ind. 1999).

<sup>107</sup>See 42 U.S.C. § 12181 (7)(F).



offices,"<sup>108</sup> when read in conjunction with the rest of the Act, it becomes evident that the broad prohibition against discrimination is aimed at every manifestation of discrimination within public accommodations.<sup>109</sup> The ADA includes within the definition of discrimination the denial of "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."<sup>110</sup> It should follow that unlawful discrimination would exist when an insurance company drafts a policy, which refuses to cover the disabilities of some, absent some type of sound and reasonable justification.<sup>111</sup> However, this type of self-evident clarity is not found among those on either side of this issue.

Insurance companies, employers, and policy holders have all offered differing interpretations involving the question of whether Title III applies to the content of policies, mere access to buildings that house insurance offices, or some intermediate conceptual construct.<sup>112</sup> Thus interpretation of the provision ultimately ends up in the hands of the courts where a consensus is likewise indistinct.<sup>113</sup>

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<sup>108</sup>*See id.*

<sup>109</sup>*See id.*

<sup>110</sup>42 U.S.C. §12182(a).

<sup>111</sup>*See id.*

<sup>112</sup>*See generally Doe v. Mutual of Omaha Ins. Co.*, 999 F. Supp. 1188 (N.D. Ill. 1998) (holding Title III to apply to the content of health insurance policies) (reversed by 179 F.3d 557 (7th Cir. 1999)); *Lenox v. Healthwise of Kentucky*, 149 F.3d 453 (6th Cir. 1998) (holding health insurance policy provided by private insurance company on behalf of school district to district employees was a good or service provided by place of public accommodation within meaning of ADA); *Chabner v. United of Omaha Life Ins. Co.*, 994 F. Supp. 1185 (N.D. Cal. 1998) (holding Title III of the ADA applies to insurance underwriting practices); *Attar v. Unum*, No. CA3-96-CV-367, R, 1998 WL 574885 (N.D. Tex. Aug. 31, 1998) (holding benefit plans are public accommodations under Title III); *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316 (C.D. Cal. 1996) (holding denial of life insurance based on applicant's association with his HIV-positive spouse was actionable under ADA). *Compare*; *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998) (holding the provision of disability benefits by employer's private insurer did not qualify as a public accommodation) (3d Cir. 1998); *Lewis v. Kmart Corp.*, 180 F.3d 166 (4th Cir. 1999) (holding Title I of ADA did not require long-term disability plan sponsored by private employer to provide the same level of benefits for mental and physical disabilities); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997) (holding ADA's prohibition against disability discrimination in any public accommodation did not govern content of long-term disability policy offered by employer).

<sup>113</sup>*See id.*

*Jurisdictions Holding the ADA Not Applicable  
to Discrimination in Insurance*

There are three main lines of reasoning that comprise court decisions, from jurisdictions which have held Title III of the ADA inapplicable to discrimination in insurance policies.<sup>114</sup> First, these courts have held that "place of public accommodation" must refer to the denial of access to a physical place.<sup>115</sup> In *Parker v. Metropolitan*,<sup>116</sup> the court agreed that an insurance office is a public accommodation as expressly set forth in Title III. However, since the plaintiff in that case did not seek the goods and services of an insurance *office* and instead accessed a benefit *plan* provided by her private employer and issued by MetLife her claim was not covered by Title III.<sup>117</sup> The court decided that "a benefit plan offered by an employer is not a good offered by a place of public accommodation. . . . [and that] a public accommodation is a physical place."<sup>118</sup>

Second, and somewhat related to the first line of reasoning, courts have noted that the ADA does not prohibit discrimination that can be characterized as discrimination "among disabilities" as opposed to discrimination between those with disabilities and those without.<sup>119</sup> For example in *Parker*, the Sixth Circuit held that a disability plan obtained through an employer that provided less coverage for mental impairments than physical impairments was not invalid under the ADA because it was not a "good or service of a place of public accommodation."<sup>120</sup> The plaintiff was seeking redress for the termination of her mental health benefits and brought an action under Title III of the ADA alleging that the terms of the insurance policy were discriminatory in nature.<sup>121</sup> The plaintiff alleged unequal access to the insurance benefits for persons with mental disabilities after the

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<sup>114</sup>See, e.g., *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997) (holding ADA's prohibition against disability discrimination in any public accommodation did not govern content of long-term disability policy offered by employer); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998) (holding the provision of disability benefits by employer's private insurer did not qualify as a public accommodation).

<sup>115</sup>See *Doe & Smith v. Mutual of Omaha*, 179 F.3d 557, 559 (7th Cir. 1999).

<sup>116</sup>121 F.3d 1006 (6th Cir. 1997).

<sup>117</sup>See *id.* at 1010.

<sup>118</sup>See *id.*

<sup>119</sup>See *id.*

<sup>120</sup>*Parker*, 121 F.3d at 1008.

<sup>121</sup>See *id.* at 1008.

plan stopped covering mental disorders but continued to cover physical injuries.<sup>122</sup> The plaintiff argued that this was discrimination based on her disability, namely depression.<sup>123</sup> The court was not persuaded.<sup>124</sup> The Sixth Circuit held that Title III did not refer to terms of insurance policies but rather, solely to the physical access to goods and services.<sup>125</sup> The court focused on the fact that the plaintiff did not access her policy from the actual insurance office but rather through her employer, and, thus, there was no sufficient "nexus between the disparity in benefits and the services which MetLife offers to the public from its insurance office."<sup>126</sup>

The Sixth Circuit employed similar reasoning in *Lenox v. Healthwise of Kentucky*.<sup>127</sup> In *Lenox*, the court held that even if insurance is a good or service of a public accommodation, the refusal to cover heart transplants cannot be grounds for a Title III claim because Title III requires the denial of access to a physical place in order for a certain practice to fall within the protection of the ADA.<sup>128</sup> The plaintiff was denied coverage for a heart transplant where the plan covered other organ transplants.<sup>129</sup> The court determined that the plan was not a good offered by a "place of public accommodation" because the court defined "public accommodation" as a physical place.<sup>130</sup> Denial of access to public accommodations does not apply to the way the goods or services offered are arranged or set forth; rather, it refers only to access to the physical place.<sup>131</sup> The court held that the insurer's denial of coverage for heart transplants, while covering other organ transplants did not discriminate in the provision of "good or service" under Title III, and that the ADA does not prohibit insurance providers from distinguishing among persons with different disabilities.<sup>132</sup>

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<sup>122</sup>See *id.*

<sup>123</sup>See *id.*

<sup>124</sup>See *id.*

<sup>125</sup>See *Parker*, 121 F.3d at 1010.

<sup>126</sup>*Id.* at 1011.

<sup>127</sup>179 F.3d 557 (7th Cir. 1999).

<sup>128</sup>See *Lenox v. Healthwise of Kentucky*, 149 F.3d 453, 456 (6th Cir. 1998).

<sup>129</sup>See *id.* at 454.

<sup>130</sup>*Id.* at 456.

<sup>131</sup>See *id.*

<sup>132</sup>See *id.* at 457-58.

Similarly, the Third Circuit employed a narrow reading of the ADA in *Ford v. Schering-Plough Corp.*<sup>133</sup> In *Ford*, the court held that disparity in coverage for mental and physical impairments in a benefit plan did not state a claim under Title III because there was no "nexus" to a physical place.<sup>134</sup> The court further stated that there existed no discrimination due to the fact that the "same" plan was provided to all employees.<sup>135</sup>

The third line of reasoning applied by courts is that application of the ADA to the terms and conditions, or content, of insurance would infringe on state regulation as was promulgated by the McCarran-Ferguson Act.<sup>136</sup> A more in depth analysis of this line of reasoning will be addressed later in this article.

### *Jurisdictions Holding the ADA Applicable to Discrimination in Insurance*

Courts ruling that the ADA prohibits discrimination in insurance policies have considered legislative history and agency guidance.<sup>137</sup> These courts have held that Title III guarantees more than mere physical access to a "place."<sup>138</sup>

In *Carparts Distribution Center, Inc., v. Automotive Wholesaler's Association of New England*, the First Circuit reversed a lower court holding that Title III did not apply the content of insurance policies.<sup>139</sup> The court pointed to the fact that the statute listed "travel service" within the list of public accommodations.<sup>140</sup> The court found that this indicated Congress' intention for the statute to cover more than mere physical access, since many travel agents conduct business over the telephone.<sup>141</sup> The court pointed out: "[I]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services

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<sup>133</sup>145 F.3d 601 (3d Cir. 1998).

<sup>134</sup>*See id.* at 612-13.

<sup>135</sup>*See Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608 (3d Cir. 1998).

<sup>136</sup>*See Doe v. Mutual of Omaha*, 179 F.3d 557, 562 (7th Cir. 1999).

<sup>137</sup>*See Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England*, 37 F.3d 12 (1st Cir. 1994) (holding "public accommodation" within meaning of Title III of ADA is not limited to actual physical structures).

<sup>138</sup>*See id.*

<sup>139</sup>*See id.* at 19.

<sup>140</sup>*See id.*

<sup>141</sup>*See id.*

over the telephone or mail are not. Congress could not have intended such an absurd result."<sup>142</sup>

The court in *Carparts* went on to discuss the consistency of holding Title III to apply to the content of insurance with legislative history of the ADA.<sup>143</sup> The court stressed that the purpose of Title III of the ADA was "to bring individuals with disabilities into the economic and social mainstream of American life. . . in a clear, balanced, and reasonable manner."<sup>144</sup> This purpose, together with the fact that "there is nothing in that history that explicitly *precludes* an extension of the statute to the substance of what is being offered,"<sup>145</sup> led the court to conclude that it could not have been Congress' intent for Title III to be read so narrowly that people with disabilities could not "fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public."<sup>146</sup>

Various other courts have followed the lead of the First Circuit. Texas has recently allowed a Title III challenge to disparity between benefits for mental and physical impairments in a long-term disability plan provided by an employer.<sup>147</sup> Likewise, a California court has recently upheld a Title III challenge to an insurer's provision of insurance at increased premium to an applicant with muscular dystrophy. The court decided that Title III means more than just physical access to a building.<sup>148</sup> Similarly, another California court has rejected a defendant's argument that Title III prohibits only denials of access to physical places and found Title III to reach denials of insurance based on disability as well.<sup>149</sup>

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<sup>142</sup>*Carparts*, 37 F.3d at 19.

<sup>143</sup>*See id.* at 20.

<sup>144</sup>*Id.*, quoting H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 99 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 382).

<sup>145</sup>*See id.*

<sup>146</sup>*See id.*

<sup>147</sup>*See Attar v. Unum*, No. CA3-96-CV-367, R, 1998 WL 574885, at \*3 (N.D. Tex. Aug. 31, 1998).

<sup>148</sup>*See Chabner v. United of Omaha Life Ins. Co.*, 994 F. Supp. 1185, 1190 (N.D. Cal. 1998).

<sup>149</sup>*See Kotev*, 927 F. Supp. at 1320.

*DOE v. OMAHA INSURANCE COMPANY MUTUAL*

On June 2, 1999, the United States Court of Appeals for the Seventh Circuit decided that insurance caps on AIDS and AIDS-related conditions, which were not justified by a cost analysis involving any actuarial data, were not prohibited under the ADA.<sup>150</sup> The case was an appeal from a decision of the District Court in the Northern District of Illinois.<sup>151</sup>

**District Court Decision**

The facts that prompted this action began when plaintiffs John Doe and Richard Smith purchased health insurance policies from Mutual of Omaha.<sup>152</sup> Both plaintiffs were diagnosed with HIV.<sup>153</sup> Both policies covered general medical expenses for up to \$1,000,000.<sup>154</sup> However, the two policies differed, in relevant part, with respect to the coverage caps for AIDS-related conditions and AIDS treatment.<sup>155</sup> Doe's policy placed a limit of \$100,000 on the amount it would pay for HIV-related care.<sup>156</sup> Similarly, the policy assigned to Smith placed a ceiling on the amount of coverage for AIDS treatment at \$25,000.<sup>157</sup> The plaintiffs argue that these caps placed on their benefits have serious negative effects on their ability to obtain and maintain the medical care needed to fight the disease.<sup>158</sup> The limits are particularly devastating because the most effective strategy for fighting the virus involves early intervention and requires a significant outlay of money at its onset.<sup>159</sup> Therefore, as plaintiffs argue, the ceiling placed on their coverage puts them at risk of serious adverse health effects by "forcing an untimely interruption in medical treatment."<sup>160</sup> Defendant Mutual of Omaha conceded the fact these caps were not consistent with sound actuarial principles, actual or reasonably anticipated experience, or bona fide risk

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<sup>150</sup>See *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557, 559-60 (7th Cir. 1999).

<sup>151</sup>See *Doe v. Mutual of Omaha Insurance Co.*, 999 F. Supp. 1133, 1190 (N.D. Ill. 1993).

<sup>152</sup>See *id.*

<sup>153</sup>See *id.* at 1190.

<sup>154</sup>See *id.*

<sup>155</sup>See *id.*

<sup>156</sup>See *Doe*, 999 F. Supp. at 1190.

<sup>157</sup>See *id.*

<sup>158</sup>See *id.*

<sup>159</sup>See *id.*

<sup>160</sup>*Id.* at 1191.

classification.<sup>161</sup> The district court held that the AIDS caps violated Title III of the ADA.<sup>162</sup>

The main issue examined in the district court's opinion revolved around how to interpret Title III of the ADA with respect to insurance policies.<sup>163</sup> The court specifically analyzed "whether Title III's prohibition against unlawful discrimination extends to the content of insurance policies offered directly through an insurer."<sup>164</sup> The specific language upon which the court focused was the provision stating: "No individual shall be discriminated against based on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."<sup>165</sup> The defendants argued that the language of the ADA's Title III only applies to access to goods and services exclusive of the goods and services themselves.<sup>166</sup> Mutual reasoned that plaintiffs enjoyed the same policies as everyone else; thus their claim of discrimination should not hold.<sup>167</sup> Alternatively, plaintiffs argued that the defendant's reading was not logical because it did not properly take into account the specific requirement that people with disabilities be provided "full and equal enjoyment" of such goods and services.<sup>168</sup> Furthermore, plaintiffs pointed to another provision in Title III which states that discrimination will be present when an individual is denied "the opportunity to participate in or benefit from a good service, facility, privilege or advantage, or accommodation that is not equal to that afforded to other individuals."<sup>169</sup> Plaintiffs reasoned that this phrase indicates that the ADA is meant to encompass more than just plain access.<sup>170</sup> The court concluded that the plaintiff's

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<sup>161</sup>*Doe*, 999 F. Supp. at 1191.

<sup>162</sup>*See id.* at 1197. The court did not discuss the issue of whether the plaintiffs were persons with disabilities as defined by the ADA due to the fact that Mutual of Omaha did not oppose the disability status of the insured. However, Mutual of Omaha did note that the issue was one which was not clearly decided among the circuits. *Id.* at n. 2.

<sup>163</sup>*See id.*

<sup>164</sup>*Id.* at 1191.

<sup>165</sup>*See id.*, quoting 42 U.S.C. § 12182 (1994).

<sup>166</sup>*See Doe*, 999 F.Supp. at 1191.

<sup>167</sup>*See id.*

<sup>168</sup>*See id.*

<sup>169</sup>*See id.*, quoting 42 U.S.C. § 12182(b)(1)(A)(ii) (1994).

<sup>170</sup>*See id.*

argument was ultimately more persuasive.<sup>171</sup> This decision was based on three main factors including the plain language of the ADA, legislative history, and the Department of Justice's guidelines relevant to disability discrimination.<sup>172</sup>

The court emphasized that the ADA's plain language mandates full and equal enjoyment of goods and services.<sup>173</sup> This language, in conjunction with the fact that the plain language nowhere limits the scope of Title III to access, led the court to conclude that the broader reading posited by the plaintiffs was correct.<sup>174</sup>

In addition, the court looked to the legislative history of the ADA's Title III.<sup>175</sup> The court noted that the legislative history of the House and Senate notes supported the idea that the ADA should apply to the content of policies.<sup>176</sup> The court particularly focused on text, which stated that insurance companies could not charge a different rate for the same coverage to persons with disabilities on the basis of a physical or mental impairment.<sup>177</sup>

The court then looked to the Department of Justice's guidance that states that the ADA "reaches insurance practices by prohibiting differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified."<sup>178</sup> The court recognized that this guidance was not binding, however; it also emphasized the congressional proscription that the Department of Justice regulations should be given controlling significance unless they are determined to be completely at odds with the statute.<sup>179</sup>

### Appellate Court Decision

The Appellate Court reversed the holding of the District court.<sup>180</sup> The court based its reasoning on "common sense" and held that the

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<sup>171</sup>*Doe*, 999 F. Supp at 1191.

<sup>172</sup>*Id.*

<sup>173</sup>*See id.*

<sup>174</sup>*See id.*

<sup>175</sup>*See id.*

<sup>176</sup>*Doe*, 999 F. Supp. at 1193.

<sup>177</sup>*See id.* at 1193, quoting H.R.Rep. No. 101-485, pt. 2, at 136-37 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 419-20.

<sup>178</sup>*See id.* at 1194.

<sup>179</sup>*See id.* at n. 6.

<sup>180</sup>*Doe*, 179 F.3d at 564-67.



“common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated.”<sup>181</sup> The court drew an analogy to various hypothetical scenarios including a shoe store refusing to sell just one shoe to a person with only one foot, a bookstore refusing to stock books in Braille for a person who is blind, and a furniture store refusing to stock wheelchairs.<sup>182</sup> The court used these hypothetical situations to illustrate the point that just as it would be unreasonable to interpret the ADA to hold the storeowners liable for failure to accommodate in these circumstances, it would be similarly unreasonable to hold the defendant insurance company liable for discrimination.<sup>183</sup> The court stated that, in the aforementioned hypothetical situations, the storeowners are neither refusing to allow people with disabilities physical access to their facilities, nor are they refusing them equal enjoyment of the goods and services once therein.<sup>184</sup> Central to this analysis was the fact that all of the customers are essentially receiving the same product.<sup>185</sup> Thus, there is no singling out of customers with disabilities. The court drew a parallel from these hypothetical situations to the situation under dispute.<sup>186</sup> The court stated that the insurance company is like the shoe store, furniture store, and bookstore because it is not refusing to allow plaintiffs access to the insurance policy.<sup>187</sup> The court further reasoned that a policy without AIDS caps would be the equivalent of the hypothetical one shoe, Braille book, and wheel chair.<sup>188</sup> Since, as seen in the hypothetical situations, it would be unreasonable to force all merchants to stock goods that were specially customized to fit each and every person with a disability in various ways, it would be similarly unreasonable to force plaintiffs responsible for tailoring their insurance policies for the benefit of the single class comprised of persons with AIDS.<sup>189</sup> “This is not a case of refusing, for example, to provide the same coverage for a broken leg, or other afflictions not peculiar to

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<sup>181</sup>*Id.* at 560.

<sup>182</sup>*See id.*

<sup>183</sup>*See id.*

<sup>184</sup>*See id.*

<sup>185</sup>*See Doe*, 179 F.3d at 560.

<sup>186</sup>*See id.*

<sup>187</sup>*See id.*

<sup>188</sup>*See id.*

<sup>189</sup>*See id.*

people with AIDS, to such people, which would be a good example of discrimination by reason of disability."<sup>190</sup>

The court then examined section 501(c)(1) of the ADA.<sup>191</sup> Section 501(c)(1) of the ADA provides that both Titles I and III "shall not be construed to prohibit or restrict an insurer . . . from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law,"<sup>192</sup> "unless the prohibition or restriction is a 'subterfuge to evade the purposes' of either title."<sup>193</sup> The plaintiffs in this case argued that since §501(c) protects insurers who manage their risks based on sound actuarial data it follows that the section also stands for the notion that insurers who do not classify risks are in violation of the Act.<sup>194</sup> In support of this argument, the plaintiffs look to legislative history which indicates that insurance companies may limit coverage based on disability status if the limitation is based either on "claims experience or on sound actuarial methods for classifying risks."<sup>195</sup> The court discounts this provision as indicative of a violation on the part of Mutual of Omaha, by virtue of its expressed absence of sound actuarial data to back up the AIDS caps.<sup>196</sup> In doing so the court relies on the notion that the provision was essentially drafted for the protection of insurance companies and that it would be "odd" for it to be interpreted in such a way as is injurious to them.<sup>197</sup>

Finally, the court finds that regardless of whether or not the safe harbor provision and legislative history militates against the insurance caps, the plaintiff's claim should fail on the basis of the McCarran-Ferguson Act.<sup>198</sup> This act forbids a reading of a federal statute, which serves to "impair any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."<sup>199</sup> The court reasoned that to dictate whether or not Mutual of Omaha's actions were within their

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<sup>190</sup>*Doe*, 179 F.3d at 561.

<sup>191</sup>*See id.* at 561-62.

<sup>192</sup>42 U.S.C. § 12201(c)(1) (1994).

<sup>193</sup>*Id.*

<sup>194</sup>*Doe*, 179 F.3d at 562.

<sup>195</sup>*Id.* at 562, quoting H.R. Rep. No. 485, 101st Cong., 2d Sess. 136-37 (1990); S. Rep. No. 116, 101<sup>st</sup> Cong., 1st Sess. 84-86 (1989).

<sup>196</sup>*See id.*

<sup>197</sup>*See id.* at 562.

<sup>198</sup>*See id.* at 563, quoting 15 U.S.C. § 1012 (1994).

<sup>199</sup>*Doe*, 179 F.3d at 563, quoting 15 U.S.C. § 1212(b) (1994)

legal bounds by virtue of a reading of the ADA, a federal statute, would be to "step on the toes" of the state since it is essentially a state function to regulate insurance.<sup>200</sup> Thus, the court reasoned, the ADA is, in a sense, preempted by the state's own regulatory regime.<sup>201</sup> Therefore, the court held that the decision should be reversed.<sup>202</sup> The court further stated that the only appropriate body, which could offer relief in this case, would be the state commissioners.<sup>203</sup>

## IMPACT AND ANALYSIS

In *Doe & Smith v. Mutual of Omaha*, the Illinois Appellate Court has added another interpretation of whether Title III applies to the content of insurance policies into the mix of contradictory decisions on this issue. It seems that this decision, as well as others, which hold that the ADA is not applicable to the content of insurance policies, will prove to do a great disservice to the intent and meaning behind the ADA. This is true for two reasons. First, the decision's reasoning seems to be more of a stretch of logic than adherence to the ADA's basic constructs. Second, the opinion does not promote a valuable public policy theory.

### Misplaced Reliance on the McCarran Ferguson Act

The Appellate court held that the McCarran-Ferguson Act<sup>204</sup> precluded the ADA from applying to the Mutual of Omaha AIDS and AIDS-related Conditions caps.<sup>205</sup> However, the court's reading of the McCarran-Ferguson Act was too narrow in light of the Supreme Court ruling in *Humana Inc. v. Mary Forsythe et al.*<sup>206</sup> In *Forsythe*, the Court held that the Act did not bar the application of RICO to fraudulent insurance practices.<sup>207</sup> The Court held that while federal statutes, under the McCarran Ferguson Act, do not operate to automatically override state insurance regulation, federal laws that specifically relate to

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<sup>200</sup>See *id.*

<sup>201</sup>See *id.* at 563.

<sup>202</sup>See *id.*

<sup>203</sup>See *id.* at 563-64.

<sup>204</sup>15 U.S.C. § 1012 (1994), cited in *Doe*, 179 F.3d at 562.

<sup>205</sup>See *Doe*, 179 F.3d at 563.

<sup>206</sup>*Humana Inc. v. Mary Forsythe et al.*, 525 U.S. 299 (1999).

<sup>207</sup>See *id.*

insurance do operate as preemptive of state law.<sup>208</sup> The Court went further to state that federal laws which do not specifically relate to the business of insurance may still be enforceable to the extent that they do not "invalidate, impair, or supercede" state law.<sup>209</sup> Therefore, the assertion offered by the Appellate Court that the ADA is superceded by the McCarran-Ferguson Act seems to be a stretch at best.

Taking this particular reasoning of the Appellate Court in conjunction with the rest of the opinion, it becomes even more apparent that it is a stretch. The Appellate Court goes to great lengths to explain how the ADA would apply to insurance companies if, for example, the insurance company were somehow attempting to preclude persons infected with HIV.<sup>210</sup> The Court stated:

There is . . . a difference between refusing to sell a health-insurance policy at all to a person with AIDS, or charging him a higher price for such a policy, or attaching a condition obviously designed to deter people with AIDS from buying the policy . . . , on the one hand, and, on the other, offering insurance policies that contain caps for various diseases some of which may also be disabilities within the meaning of the Americans with Disabilities Act."<sup>211</sup>

Looking at this in light of the brief discussion of the McCarran-Ferguson Act, with which the Court deals at the end of the opinion, exposes an inconsistency. It seems that if this is truly a viable argument, there would be no need at all to go into a discussion of whether the ADA would cover the practice of Mutual of Omaha in some hypothetical case. The Court seemed to contradict itself by simultaneously advancing two inconsistent ideas. On the one hand the Court held that the ADA would be applicable to an insurance provider in the case where that provider is making it more difficult for people to access insurance through cost. On the other hand, however, the Court held that the ADA could not possibly apply to an insurer at all due to the fact that the McCarran-Ferguson Act places all regulation of this sort in the hands of the state commissioners. This inconsistency leads

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<sup>208</sup>*See id.*

<sup>209</sup>*Id.* at 304.

<sup>210</sup>*See Doe*, 179 F.3d at 563.

<sup>211</sup>*See id.*

one to wonder which of these theories is viable and offers little in the way of what future finders of fact can rely on for guidance.

One of the reasons the court decided that there was no discrimination in this instance is that Mutual of Omaha offers the same policy to all of its insured.<sup>212</sup> Thus, as the reasoning goes, there is no improper singling out,<sup>213</sup> and no discrimination can possibly exist.<sup>214</sup> However, this oversimplified type of reasoning is of the same kind as has been rejected in the similar context of sex discrimination.<sup>215</sup> In relying on the argument that discrimination cannot possibly exist when everyone is offered the same policy, the court circumvented previous Supreme Court decisions.<sup>216</sup> In *Arizona Governing Comm. For Tax Deferred Annuity and Deferred Comp. v. Norris*, employees of the state took issue with a pension plan that was offered to both men and women equally.<sup>217</sup> The policy offered an annuity plan, however, which paid out lower monthly benefits at retirement to women than to men.<sup>218</sup> The Supreme Court rejected the argument that since the same plan was offered to all policyholders there was no discrimination.<sup>219</sup> The Court held that this was blatant sex discrimination.<sup>220</sup> It seems to follow, therefore, that a policy based on disability status is similarly discriminatory in nature. The same type of reasoning could easily apply to a case involving disability discrimination. In *Mutual of Omaha*, even though the plaintiffs are offered the same plan as all other insured, they are specifically at a disadvantage due to the fact that the policy excludes coverage for their particular disability just as the women in *Arizona Governing Comm.* were specifically at a disadvantage due to their particular gender. It is apparent by the holding in that case that the Court will look at the overall effect and

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<sup>212</sup>See *id.* at 562-63.

<sup>213</sup>See *id.*

<sup>214</sup>See *id.*

<sup>215</sup>See *Ariz. Governing Comm. for Tax Deferred Comp. v. Norris*, 463 U.S. 1073, 1080 (1983); *Los Angeles Water and Power v. Manhart*, 435 U.S. 702, 707-08 (1978). The court in *Norris*, concluded that "it is just as much discrimination 'because of ...sex' to pay a woman lower benefits when she has made the same contributions as a man as it is to make her pay larger contributions to obtain the same benefits." *Norris*, *supra* at 1086.

<sup>216</sup>See *id.*

<sup>217</sup>*Norris*, 463 U.S. at 1081.

<sup>218</sup>See *id.*

<sup>219</sup>See *id.*

<sup>220</sup>See *id.*

impact of insurance plans to determine whether there truly exists discrimination and will not merely accept a non-substantive semantic argument on its face.

### Public Policy

A second consideration, in the wake of this decision, is what effect it will have on society in general, on persons infected with HIV, and on the state. *Mutual of Omaha* renders the value of insurance policies for people infected with HIV seriously diminished. In the wake of the decision, people with HIV will have to be acutely aware that whatever treatment they elect to undergo will toll their treatment funds. Thus many people will likely elect not to take on treatments that are more costly than others. It follows from this that they will become increasingly ill at a faster pace.<sup>221</sup> This effect is in contradiction with the intent of the ADA, which sets forth the hope that people with disabilities become more productive members of society.<sup>222</sup> Unfortunately, most infected people will die sooner than necessary. Research in this area is progressing at an exceeding rate. Thus many of these people will not be able to take advantage of new treatments which are becoming more effective, will become non-productive members of society due to illness or death, and all that they may have given through this production will be lost.

On a financial level, the legitimization of insurance caps on AIDS and AIDS-related conditions will place a greater burden on state resources. Since there will be limited financial resources within the insurance context for people infected with HIV to rely upon they will have to default to their own funds. These funds will likely be liquidated quickly due to the costs of treatment. Therefore, most people with HIV will eventually become dependant on state Medicaid resources for what limited treatment it will cover. This phenomenon will have a negative effect on the economy in general, since there will be a drain on state resources where it would be more fiscally healthy for the loss to be handled by insurance companies. The purpose is to spread loss in light of sound risk management techniques.<sup>223</sup> The

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<sup>221</sup>*See id.*

<sup>222</sup>*Norris*, 463 U.S. at 1081.

<sup>223</sup>Eric C. Sohlgren, Note, *Group Health Benefits Discrimination Against AIDS Victims Falling through the Gaps of Federal Law—ERISA, the Rehabilitation Act and the Americans*

impact of this decision reverts from this purpose. It will place a great percentage of the loss upon state resources and take all risk of loss out of the hands of the insurance providers.

### CONCLUSION

Reading the ADA to cover the terms of insurance policies would allow the purpose and intent of the legislation to ring true. Advancing medical research in the treatment of AIDS and AIDS-related conditions allows people with the virus to be more effectively treated if they begin treatment in the early stages of the disease. Placing caps on the treatment of AIDS will stifle this effective treatment, lead to early death, and prematurely rob society of all that these people offer. Caps will also place a drain on the resources of the state. However, most importantly, allowing insurance caps based solely on disability status, without any sound actuarial data relating treatment to cost, will feed and nourish the pernicious stigma attached to people with HIV and AIDS. Passivity to such a stigma is something for which this country's jurisprudence clearly does not stand.